LABOR RELATIONS ISSUES IN CONTRACTING OUT

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Excerpts from applicable statutory provisions of the Federal Service Labor-Management Relations Act (also referred to as Title VII of the Civil Service Reform Act of 1978):

Management Rights - 5 USC 7106

(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency -

(2) in accordance with applicable laws -

(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted...

(b) Nothing in this section shall preclude any agency or any labor organization from negotiating

(2) procedures which management officials of the agency will observe in exercising any authority under this sections; or

(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

Representation Rights - 5 USC 7114

(a)(1) A labor organization which has been accorded exclusive recognition...is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit...

Duty to bargain in good faith - 5 USC 7117

(a)(1) ...the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

Grievance Procedures - 5 USC 7121

(a)(1) ...any collective bargaining agreement shall provide procedures for the settlement of grievances...

(b) Any negotiated grievance procedure...shall -

(3) include procedures that -

(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration...

Definition of a Grievance - 5 USC 7103(a)(9)

(9) 'grievance' means any complaint -

(C) by any employee, labor organization, or agency concerning -

(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

Union Rights to Information - 5 USC 7114(b)(4)

[The duty to negotiate in good faith includes the obligation -]

(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data -

(A) which is normally maintained by the agency in the regular course of business;

(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

(C) which does not constitute guidance, advice, counsel, or training provided for management officials relating to collective bargaining...

YES, NO, YES, NO, MAYBE

OR

ARE CONTRACTING OUT PROPOSALS NEGOTIABLE?

At the most basic level, the answer to the above question depends on how one reconciles management's authority to make determinations with respect to contracting out under 5 USC 7106(a)(2)(B) with the union's rights to bargain in accordance with 5 USC 7114(a)(4) and to grieve "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment" pursuant to 5 USC 7121.

One might expect that a decision from the Supreme Court of the United States would provide a reliable answer to the above question, but the Federal Labor Relations Authority (FLRA or the Authority) is not easily persuaded to limit the scope of bargaining.

In 1990, the Supreme Court reviewed a union proposal to adopt its negotiated grievance procedure as the administrative appeals process required by OMB Circular A-76. This would allow employees to use the collective bargaining agreement's grievance and arbitration provisions to contest contracting out decisions.

The FLRA held that the Internal Revenue Service was required to bargain over this proposal. The U.S. Court of Appeals for the District of Columbia Circuit affirmed. In a six to three decision written by Justice Scalia, the Supreme Court reversed and remanded:

Department of the Treasury, IRS vFLRA, 494 US 922 (1990).

According to Justice Scalia: "The FLRA's position is that the management rights provisions of Sec. 7106 do not trump Sec. 7121, which entitles the union to negotiate and enforce procedures for resolving any 'grievance' as defined in Sec. 7103 -- that is, any claimed 'violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment.'...Thus, according to the FLRA, it makes no difference whether OMB Circular A-76 is an 'applicable law' [under 5 USC 7106(a)(2)]; so long as it is a 'law, rule, or regulation' within the meaning of Sec 7103(a)(9)(C)(ii), Sec. 7106(a) does not bar mandatory negotiation..." The Supreme Court concluded that "the FLRA's construction is not reasonable."

In essence, the Court held that the management rights provisions of 5 USC 7106(a) supersede the grievance provisions of 5 USC 7121 regardless of whether or not OMB Circular A-76 is an "applicable law":

> Section 7106(a) says that, insofar as union rights are concerned, it is entirely up to the IRS whether it will comply at all with Circular A-76's cost-comparison requirements, except to the extent that such compliance is required by an "applicable law" outside the [Civil Service Reform] Act.

The Court did not decide whether or not Circular A-76 is an "applicable law" under 5 USC 7106(a), nor whether it is a "law, rule, or regulation" under 5 USC 7103. Furthermore, the Court did not consider IRS's argument that the union's proposal could also be held nonnegotiable under 5 USC 7117(a)(1) as a "Government-wide rule or regulation" prohibiting arbitration.

Justice Stevens agreed with the Court's conclusion that the union's proposal was nonnegotiable, but dissented because he would have held either that Circular A-76 placed no limitations on management rights under 5 USC 7106(a) because it is not an ìapplicable law;" or that Circular A-76 would certainly have to be considered a nonnegotiable "Government-wide rule or regulation" under 5 USC 7117(a)(1).

Justice Brennan, joined by Justice Marshall, dissented on the theory that the union's proposal should have been viewed as negotiable even if Circular A-76 were considered to be both an "applicable law" and a "Government-wide rule or regulation" because the proposal "would not affect the Internal Revenue Service's authority to make contracting out decisions."

On remand, the FLRA concluded that Circular A-76 was an "applicable law" within the meaning of 5 USC 7106(a) and that a union's negotiated grievance procedure could be used to challenge alleged failures by the agency to comply with its requirements. NTEU and Dept. of Treasury, IRS, 42 FLRA 377 (1991) [enforcement denied, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)]. The Authority contended that unions could seek to enforce Circular A-76 as an "applicable law" under negotiated grievance procedures even if the Circular itself appears to preclude such grievances. In subsequent cases, the FLRA held that a proposal requiring compliance with Circular A-76 could also be found negotiable under 5 USC 7106(b)(3) as an "appropriate arrangement for employees who are adversely affected by management's decision to contract out." NTEU and Dept. of Treasury, Bureau of Pub. Debt, 42 FLRA 1333 (1991) [enforcement denied, Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)].

Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993).

When the D.C. Circuit reviewed FLRA decisions which continued to find union proposals negotiable even after the Supreme Court issued its decision in 1990, it applied the reasoning of Justice Steven's dissent. Accordingly, it held that Circular A-76 is nonnegotiable as a "Government-wide rule or regulation" under 5 USC 7117(a) whether or not it is an "applicable law" under 5 USC 7106(a). Furthermore, it reached the rather obvious conclusion that "collective bargaining over the method for resolving disputes concerning application of the Circular and arbitration of claimed 'violations' of the Circular would both be inconsistent with the terms of the Circular":

> We hold that if a government-wide regulation under section 7117(a) is itself the only basis for a union grievance - that is, if there is no preexisting legal right upon which the grievance can be based - and the regulation precludes bargaining over its implementation or prohibits grievances concerning alleged violations, the Authority may not require a government agency to bargain over grievance procedures directed at implementation of the regulation. When the government promulgates such a regulation, it may not be hoisted on its own petard.

The D.C. Circuit Court also noted that: "Unlike the exemption in the management's rights section, the government-wide regulation exception to an agency's obligation to bargain is not conditioned by the need to bargain over 'appropriate arrangements'."

The Authority continued to resist what might by then have appeared to be an inevitable conclusion. In cases such as NTEU and Dept. of Treasury, 47 FLRA 304 (1993), it continued to uphold the negotiability of provisions requiring agency compliance with Circular A-76.

Shortly thereafter, however, in AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 168 (1993), the Authority surrendered to the views of the D.C. Circuit Court.

AFGE Local 1345 and Dept. of Army, Fort Carson, 48 FLRA 168(1993).

"We adopt the Court's conclusion [in Dept. of Treasury, IRS v. FLRA, 996 F.2d 1246 (D.C. Cir. 1993)] that Circular A-76 is a Government-wide regulation and that proposals subjecting disputes over compliance with the Circular to resolution under a negotiated grievance procedure are nonnegotiable. Previous decisions to the contrary will no longer be followed."

The Authority also conceded the fact that proposals which are inconsistent with a Government-wide regulation such as Circular A-76 could not be held negotiable as "appropriate arrangements" under 5 USC 7106(b)(3).

The Authority continues to rely on the Fort Carson case in finding union proposals nonnegotiable if the proposals would infringe on management rights under 5 USC 7106(a) or if, contrary to 5 USC 7117(a), they are inconsistent with Circular A-76:

In IFPTE Local 3 and Dept. of Navy, Philadelphia Naval Shipyard, 51 FLRA No. 40 (Oct. 31, 1995) [Proposal #2], the Authority held that proposals such as those prohibiting an agency from contracting out any function that had undergone a reduction-in-force (RIF) for a 1-year period following the effective date of the RIF were nonnegotiable under 5 USC 7106(a)(2)(B): "Proposals prescribing when a management right may be exercised constitute substantive limitations on, and directly interfere with the exercise of, that right. See, e.g., National Guard Bureau, 49 FLRA at 890. By prohibiting the Agency from exercising its right to contract out during the specified time period, Proposal 2 constitutes such a substantive limitation. Accordingly... we find that Proposal 2 affects the exercise of management's right, under section 7106(a)(2)(B), to make determinations with respect to contracting out."

In AFGE Local 151 and Dept. of Navy, Naval Air Station Whidbey Island, 52 FLRA No. 70 (Dec. 20, 1996) the Authority again relied on its Fort Carson decision in upholding an Arbitrator's award. The arbitrator found that the claim of a violation of OMB Circular A-76 or the Supplemental Handbook thereto does not concern a grievable or arbitrable matter. The Authority agreed: "[E]ven though determinations regarding contracting out must be made in accordance with the Circular, the Circular itself bars grievances under the negotiated grievance process. As such, the Arbitrator correctly held that the grievance is not arbitrable."

IMPACT & IMPLEMENTATION BARGAINING

OR

WHAT IF THE UNION PROPOSAL IS NOT INCONSISTENT WITH A-76?

If a union proposal neither incorporates nor conflicts with OMB Circular A-76, the union may be able to successfully argue that it is negotiable under 5 USC 7106(b)(2) as a procedure for implementing management's right to contract out or under 5 USC 7106(b)(3) as an appropriate arrangement for employees adversely affected by the contracting out determination. Although the Authority's decision in Department of Army Headquarters, Fort Sill and NFFE, 29 FLRA 1110, 29 FLRA No. 82 (1987) actually concerned an election, rather than bargaining rights, it does contain the flat statement that "...impact and implementation bargaining concerning contracting out is within the duty to bargain."

In the context of contracting out, where many of the procedures are controlled by Circular A-76, most of the cases dealing with I & I bargaining focus on "impact" (i.e., "appropriate arrangements") rather than "implementation" (i.e.,"procedures").

HOW CAN YOU DISTINGUISH A NEGOTIABLE APPROPRIATE ARRANGEMENT FROM AN INFRINGEMENT OF MANAGEMENT'S RIGHT TO CONTRACT OUT ?

As recently as October 30, 1996, the Authority confirmed that the approach it still uses for determining whether or not a proposal is within the duty to bargain under 5 USC 7106(b)(3) is set out in NAGE, Local R14-87 and Kansas Army National Guard (KANG), 21 FLRA 24; 21 FLRA No. 4 (February 7, 1986). Under KANG, the FLRA initially determines whether the proposal is intended to be an arrangement for employees adversely affected by the exercise of a management right. In order to address this threshold question, a union should identify the management right or rights claimed to produce the alleged adverse effects, the effects or foreseeable effects on employees which flow from the exercise of those rights, and how those effects are adverse. The alleged arrangement must be tailored to compensate or benefit employees suffering adverse effects attributable to the exercise of management rights. If the proposal is an arrangement, the Authority determines whether it is appropriate or is inappropriate because it excessively interferes with the relevant management right. AFGE, Local 1687 and VA, 52 FLRA No. 48 (1996).

NAGE, Local R14-87 and Kansas Army National Guard (KANG), 21 FLRA 24; 21 FLRA No. 4 (February 7, 1986).

"Once the Authority has concluded that a proposal is in fact intended as an arrangement, the Authority will then determine whether the arrangement is appropriate or whether it is inappropriate because it excessively interferes. This will be accomplished, as suggested by the D.C. Circuit [in American Federation of Government Employees, AFL-CIO, Local 2782 v. Federal Labor Relations Authority, 702 F.2d 1183 (D.C. Cir. 1983)], by weighing the competing practical needs of employees and managers. In balancing these needs, the Authority will consider such factors as:

(1) What is the nature and extent of the impact experienced by the adversely affected employees, that is, what conditions of employment are affected and to what degree?

(2) To what extent are the circumstances giving rise to the adverse affects within an employee's control?...

(3) What is the nature and extent of the impact on management's ability to deliberate and act pursuant to its statutory rights, that is, what management right is affected; is more than one right affected; what is the precise limitation imposed by the proposed arrangement on management's exercise of its reserved discretion or to what extent is managerial judgment preserved?...

(4) Is the negative impact on management's rights disproportionate to the benefits to be derived from the proposed arrangement?...

(5) What is the effect of the proposal on effective and efficient government operations, that is, what are the benefits or burdens involved?

These considerations are not intended to constitute an all-inclusive list. As frequently noted in the opinions of various judicial and quasi-judicial entities, an adjudicative body must consider the totality of facts and circumstances in each case before it. Additional considerations will be applied where relevant and appropriate. Inasmuch as a ritualistic or mechanistic approach is neither suggested, nor contemplated, the Authority will expect the parties to cases of this nature filed in the future to address any and all relevant considerations as specifically as possible."

Beyond the Federal Service Labor-Management Relations Act

I. Access to Information

If the union's requests for information are unrelated to a matter within the scope of bargaining, it cannot rely on 5 USC 7114(b)(4) to obtain that information. The union can, however, submit requests under the Freedom of Information Act, 5 USC 552, provided that it is willing to be treated the same as any other private citizen. More importantly, however, the union can rely on the formalized requirements for agencies to consult with labor representatives under OMB Circular A-76 with Revised Supplemental Handbook (March 1996).

II. Challenges to Contracting Out Decisions

A. The fact that unions have not been able to rely on their negotiated grievance procedures to challenge management's substantive decisions to contract out does not mean that they have no recourse to seek review of management decisions. The union representatives of federal employees "that will or could be impacted by a decision to waive a cost comparison or have submitted bids to convert to or from in-house, contract or ISSA performance, as a result of a cost comparison" are "affected parties" as defined by the A-76 Supplemental Handbook, and have access to the administrative appeals process required by A-76.

B. It is not yet clear whether or not federal employees and unions will have standing to bring suits in federal courts under the Administrative Procedure Act (APA), 5 USC 701(a)(2). Although courts have traditionally limited appeals of contracting decisions, we can anticipate an increasing number of cases as contracting out continues to receive government emphasis. Recent cases which discuss jurisdictional issues include:

National Federation of Federal Employees v. Cheney, 883 F. 2d 1038 (D.C. Cir. 1989), cert. denied, 496 US 936 (1990) - holding that federal employees and their representatives lacked standing to challenge the merits of a decision to contract out.

Diebold v. US, 947 F. 2d 787 (6th Cir. 1991), rehearing denied, 961 F. 2d 97 (1992) - holding that the contracting out decision in a wrongful privatization case is reviewable in a federal court under the Administrative Procedure Act. (Remanded for further proceedings including development of the facts and laws governing standing).